FRONT LINE Report

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Sunshine Law info a click or call away

Missouri law enforcement can turn to the Attorney General's Office as a resource for questions about the state's Sunshine Law. Several sections of the law address the openness of arrest, incident and investigative reports; the expungement of arrest records; the accessibility of 911 reports; and other law enforcement-related topics.

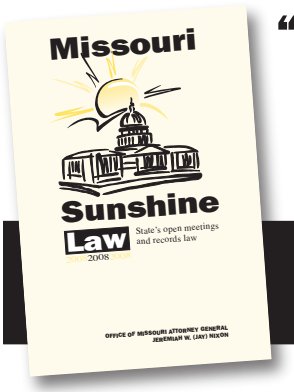
Attorney General Jay Nixon has published an updated 80-page booklet on the Sunshine Law.

Since the booklet's last update, the General Assembly passed a law that extends the sunset for two exceptions under the Sunshine Law that allow a public body to close certain meetings and records relating to homeland security.

In addition to containing the entire Sunshine Law, the booklet also provides answers to frequently asked questions, a list of court decisions and Attorney General opinions interpreting the law, and sample forms for officials to use in posting meetings and for citizens or members of the media to request records.

Law enforcement officers who have questions about the Sunshine Law also may contact assistant attorneys general Ted Bruce or James Klahr at 573-751-3321 or ask questions online at ago.mo.gov/sunshinelaw.

Each year, the office handles hundreds of inquiries from citizens, the media and government officials to promote better understanding and compliance with the law.



> "It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law."
>
> — **Section 610.011 of the Sunshine Law**

The Sunshine Law booklet can be found online or ordered for free at **ago.mo.gov.** You also can call **800-392-8222**.

Firearms restricted for felons in Missouri

The Missouri Legislature made significant changes to the law dealing with felons in possession of firearms, and Missouri law now more closely follows federal law.

It is now a class C felony for **any** convicted felon to possess **any** firearm, including a handgun, rifle or shotgun.

Missouri has not historically been so restrictive. The state's prohibition had been limited to concealable weapons (such as handguns) and applied only to "dangerous" felons. A dangerous felon was an individual who pleaded guilty to, or was convicted of, only certain felonies. For this reason, most convicted felons could use a rifle or shotgun for hunting if they had completed their probation or parole.

Convicted felons no longer can possess **any** firearm, including a handgun, rifle or shotgun. Felons can still hunt with bows, which are not considered firearms.

Under Missouri law, a "conviction" includes a suspended execution of sentence but does not include a suspended imposition of sentence. Thus, someone who pleads guilty and receives an SIS is not deemed a convicted felony for purposes of this law.

Because the prohibition now includes rifles and shotguns, many felons who could lawfully hunt under Missouri law may no longer do so. (Bows are not "firearms" and felons may continue to bow hunt.)

As was the case before the 2008 change, a felon cannot obtain a concealable weapons permit under Missouri law. This includes felons receiving an SIS. (§ 571.101, RSMo)

Court rules for privacy of officer's text messages

A police officer in Ontario, Calif., had a reasonable expectation to the privacy of text messages he sent on his official pager, a federal court has ruled.

The officer sued his department after it received transcripts of the text messages from the telephone company to determine if the officer used the pager for personal use.

The issue was whether the department violated federal law (18 U.S.C. § 2701) by receiving transcripts from the telephone company of the officer's communications.

The department had a policy for computers, Internet and e-mail usage that stated officers had no expectation of privacy when using these, but no explicit policy regarding pagers.

Quon v. Arch Wireless Operating Co.
No. 07-55282
C.A. 9, June 18, 2008

The 9th U.S. Circuit Court of Appeals held the officer had a reasonable expectation of privacy in his text messages and the phone company violated federal law by turning over the transcripts to the police department.

Under federal law, the transcripts can be released only with the consent of the recipient or sender, and it did not matter that the department was the actual subscriber to the paging service.

The court also concluded that the department's informal policy, which made no reference to text messaging, gave the officer a reasonable expectation of privacy in the text messages violated by the department. While the chief was given qualified immunity because he did not violate "clearly established law," the city and department were liable for violating the officer's privacy rights.

Sex offenders' online profiles pulled

Attorney General Jay Nixon has worked with MySpace to remove the online profiles of more than 1,200 registered sex offenders from Missouri.

Nixon and other Attorneys General have pushed for changes at MySpace and other social networking sites to protect young people from online predators. MySpace now deletes the profile of any user it identifies as a sex offender, then forwards the account information to Nixon's office.

The Attorney General has turned over to the Missouri State Highway Patrol 1,237 profiles that matched those of registered Missouri sex offenders, including some offenders who had more than one profile.

Nixon has asked the patrol to look for parole violations by offenders who may be barred from using a computer or from contacting minors.

"This has been a nationwide effort to protect kids that continues to get results," Nixon said.

In addition to removing the profiles, MySpace and Facebook also are implementing measures to improve age and identity verification of their users.

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ID Theft Hotline
800-392-8222

Nixon has set up a hotline to help Missourians recognize and report identity theft. He also has a complaint form online at **ago.mo.gov** for victims to report theft.

Front Line Report is published periodically by the Missouri Attorney General's Office. It is distributed to law enforcement throughout the state. Find issues at ago.mo.gov/lawenforcement.htm
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PLEA AGREEMENTS

State v. Banks

No. 66035, Mo.App., W.D., April 15, 2008

Ozie Banks pleaded guilty in 1991 on charges arising from three cases. At the plea hearing, the prosecutor informed the court that Banks had been a suspect in two rape cases in which the state had declined to file charges as a result of the plea bargain.

In explaining the plea bargain, the prosecutor said, "Additionally, the state promises not to file any other cases for which Mr. Banks may have been a suspect in this series of offenses. The state has been provided with only two police files regarding additional cases. So for the record, I will state that as a result of the plea today the state will decline charges in the police file number 90-007936 and 90-035634. Should there be any other cases brought to our attention, again, pursuant to this series of offenses, they will not be filed upon by our office as a result of this plea bargain."

In 2004, DNA testing indicated that Banks was the rapist in an unsolved 1986 case. Banks was charged and convicted after a bench trial.

Banks argued on appeal that the case should have been dismissed because, by filing charges, the state violated the plea agreement in which it promised not to file any more charges.

The appeals court disagreed, noting that the promise was only not to file charges in any other cases in which Banks had been a suspect in "this series of offenses."

The state did not promise to refrain from charging Banks with any crime he may have committed before the plea, and the 1986 case was not a part of Banks' 1990 crime spree.

UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/

WAIVER OF COUNSEL

Indiana v. Edwards

No. 07-208, June 19, 2008
128 S.Ct. 2379

The U.S. Supreme Court held that the states may insist on representation by counsel for defendants who although competent to stand trial, suffer from severe mental illness to the point where they are not competent to represent themselves at trial. The court rejected the use of a single competency standard for both competency to stand trial and for self-representation. Although the court rejected Indiana's standard, which would deny a defendant the right to self-representation if that defendant cannot communicate coherently with the court or jury, it offered no standard for lower courts to follow in dealing with these types of situations.

WAIVER OF JURY TRIAL

Dishmon v. State

No. 28361,
Mo.App., S.D., March 27, 2008

In this post-conviction case, the defendant claimed that counsel coerced him to waive his right to a jury trial. This case is a good example of the kind of record that ought to be made when a defendant waives this right. Before trial, Melvin Dishmon filed a written waiver, and he was personally questioned in open court. Then, although the record made at trial was pretty solid, a post-conviction evidentiary hearing was held, and trial counsel was able to fully explain his reasoning in advising Dishmon to waive. The counsel knew Dishmon wanted to testify and, accordingly, his prior convictions would be admitted into evidence. Additionally, counsel thought a conviction was likely and that sentencing probably would be best handled by the judge.

DUTY TO DISCLOSE

State v. Delancy

No. 89589, Mo.App., E.D., July 22, 2008

During discovery the state disclosed a cell phone, but Christopher Delancy complained that the state did not disclose data retrieved from the phone, specifically, the call log. The court of appeals found no discovery violation, because disclosure of the cell phone itself was sufficient to give Delancy the opportunity to adequately prepare since the call log was easily accessed and displayed on the cell phone.

CONFRONTATION

State v. Hill

No. 89196, Mo.App., E.D., March 4, 2008

Before the victim was called to testify in this first-degree child molestation case, the prosecutor moved the podium so the victim could not see defendant Henry Hill.

Hill objected that he would not be able to see the witness stand.

The prosecutor argued that the victim had not seen Hill in two years and would be traumatized if she had to confront him in a roomful of strangers.

The appeals court found this to be a violation of Hill's face-to-face confrontation rights where there was no evidence or findings that the victim would suffer emotional or psychological trauma if made to testify in view of the defendant.

Without any evidence or findings that the child victim would suffer emotional or psychological trauma, the defendant's right to a face-to-face confrontation was violated.

Note: Missouri courts generally require that emotional or psychological trauma be established by expert testimony.

DISTRIBUTION WITHIN 1,000 FEET OF PUBLIC HOUSING

State v. Minner

No. 88986, Mo.banc, June 30, 2008

The Missouri Supreme Court overruled its prior decision in State v. Hatton, 918 S.W.2d 790 (Mo. banc 1996), and ruled that the state is required to prove that a defendant knows of his proximity to public housing in order to convict for distribution of a controlled substance near government-assisted housing. Section 195.218 constitutes a separate offense, not merely a penalty enhancement.

POSSESSION, SUFFICIENCY, CONSTRUCTIVE POSSESSION

State v. Ingram

No. 67787, Mo.App., W.D., April 15, 2008

The court of appeals reversed Michelle Ingram's conviction for possession of a controlled substance on the ground of insufficient evidence.

Trial evidence showed that although Ingram did not own the car in which drugs were found, she was driving the car, claimed ownership of it, and treated it as her own. Moreover, the drugs were found on the car seat.

The court held that this evidence was insufficient to establish constructive possession because the state failed to adduce additional evidence connecting Ingram to the drugs.

Although the state had argued Ingram was sitting on the pebble-sized rock of crack cocaine when it was found by police, the court held that no evidence admitted at trial established this. Also, the drugs were not in plain sight, were not commingled with Ingram's belongings, and no evidence showed that Ingram was nervous or made incriminating statements.

UPDATE: CASE LAW

SUFFICIENCY, DEADLY WEAPON

State v. Payne

No. 67999, Mo.App., W.D., April 29, 2008

Donald Payne stabbed the victim in the neck, ribs and buttocks, leaving a neck wound big enough to put a finger in it. The weapon was never found, and the state could not produce a description of it.

Payne was charged with assault predicated upon an attempt to cause physical injury by a deadly weapon, namely, a dagger. The appeals court found there was insufficient evidence to show that the weapon was a dagger.

There was no evidence describing the object used as having a single or double blade, a handle, any particular length, or any of its designed purposes, and no medical evidence was offered to indicate the wounds were consistent with a particular type of weapon. There was no evidence that a dagger — as opposed to some other short, pointed item such as a screwdriver, pen or glass shard — had been used in the stabbing.

POSSESSION, SUFFICIENCY, TRACE AMOUNTS

State v. Breese

No. 27858, Mo.App., S.D., March 14, 2008

The appeals court found sufficient evidence of knowing possession of meth. Although only a trace amount of meth was found on a scale and bowl in Lawrence Breese's toiletry bag, the white powdery substance was visible and of a sufficient quantity to allow the officer to field test it. Since the powder was visible to the officer, it would have been visible to Breese as well. Also, Breese first denied the bag was his, then admitted it was his, but then asserted that his sister had packed the bag.

Breese said he had been using meth and was high. Most tellingly, Breese voluntarily told the officer he was not selling meth, although the officer had never mentioned that possibility.

MURDERER'S IDENTITY, CIRCUMSTANTIAL EVIDENCE

State v. Calhoun

No. 67579, Mo.App., W.D., April 15, 2008

Mack Calhoun was convicted of first-degree murder in the 1989 shooting of a woman based on a "cold hit" from the state DNA database showing that semen found on the victim contained the defendant's DNA.

Trial evidence showed that the victim was found on her back in a desolate area immediately after having been shot in the head.

The blood trail from the head wound showed that the victim was on her back when she was shot, and a semen trail found on the victim's buttock showed the semen traveling "up" the victim's body, rather than down her leg, which supported the inferences that the victim had had sex and was on her back at or near the time she was shot.

The court held that all of this evidence, including the defendant's statements denying he had ever met the victim, constituted sufficient evidence to support the conviction.

SEXUAL OFFENDER, LIVING NEAR SCHOOL

State v. Gonzales

No. 89566, Mo.App., E.D., April 22, 2008

Robert Gonzales, a convicted sex offender, appealed his conviction for establishing residence within 1,000 feet of a school on the ground that the evidence was insufficient to show that he knew his home was within 1,000 feet of a school.

The court of appeals rejected this claim on the ground that trial evidence showed that Gonzales could see the school and playground from the back of his home, that Gonzales admitted knowing there was a church at that location, but was unaware of a school, and that Gonzales drove by the school on his way to and from work.

VIOLATING ORDER OF PROTECTION

State v. Bush

No. 28623, Mo.App., S.D., April 16, 2008

The appeals court reversed the defendant's conviction for a misdemeanor violation of a full order of protection because the evidence was insufficient to find that Fred Bush initiated communication with the victim in violation of the order.

Trial evidence showed that after a hearing in which the victim was granted a full order of protection, she left the courtroom and stopped at the sheriff's office. Bush left the courtroom after her and walked in the same direction. As Bush walked toward her, the victim started screaming, "Stop coming toward me." She screamed this 10 times as Bush "smirked" and walked by her.

The court ruled this evidence was insufficient to support the conviction because it did not show that Bush initiated communication.

EXPERT TESTIMONY, FALSE CONFESSIONS

State v. Wright

No. 28416, Mo.App., S.D., March 18, 2008

In a trial for two counts of first-degree statutory sodomy, Joseph E. Wright tried to present the expert testimony of Dr. Rosalyn Shultz. The forensic psychologist had never interviewed Wright, but hoped to testify about false confessions and about Wright's personality traits that made it more likely for him to make a false confession.

The appeals court found that the testimony was properly excluded as it would have invaded the province of the jury in that it related to the credibility of Wright's confession.

UPDATE: CASE LAW

VIOLATIONS OF STATE LAW

Virginia v. Moore

No. 06-1082, April 23, 2008
128 S.Ct. 1598

Under Virginia law, a person found to be driving under a suspended license must be issued a summons. David Moore was not issued a summons, but was arrested by police in violation of state law. A search incident to the arrest revealed that Moore had crack cocaine.

The Virginia Supreme Court reversed Moore's possession conviction on the ground that the drugs should have been suppressed as fruit of an illegal search under the Fourth Amendment because officers violated state law in arresting Moore and conducting the search that led to the discovery of the drugs.

The U.S. Supreme Court reversed and held that an officer has the right to arrest any person when that officer has probable cause to believe the person has committed even a minor crime.

The court refused to change this rule simply because a state has chosen to protect privacy beyond that required by the Fourth Amendment as Virginia did in this case by requiring that a person driving with a suspended license be issued a summons instead of arrested.

A state's decision to choose a more restrictive search-and-seizure policy does not mean that a less restrictive one permissible under the Fourth Amendment is automatically unreasonable and thus unconstitutional.

WARRANTLESS SEARCHES, AUTOMOBILE EXCEPTION

State v. Breese

No. 27858, Mo.App., S.D., March 14, 2008

Deputy Carmello Crivello had probable cause to support a warrantless search of Lawrence Breese's car following a traffic stop. Breese's car had California license plates and was traveling at a high rate of speed on I-44, a known drug corridor. When Deputy Crivello activated his emergency lights, the vehicle initially slowed and pulled to the shoulder, but then began to increase speed. The vehicle did not stop until Crivello activated his siren.

When Crivello approached the car, he noted that both the driver and Breese exhibited signs of "tweaking" from meth use. During the stop, Breese disobeyed Crivello's repeated orders to stay inside the vehicle and get off his cell phone while Crivello spoke with the driver. Crivello told Breese he knew he was high and Breese said, "I know, I love this s___, but I, I'm not selling any. I ain't got no money, I'm not selling it."

DEFENDANT STATEMENTS, COERCION

State v. Jackson

No. 26880, Mo.App., S.D., Feb. 20, 2008

Timmy Jackson claimed that he was coerced into making statements to police because the police lied to him about why he was being taken from the jail. The officer initially told Jackson he was being transferred from the Dunklin County Jail to the Pemiscot County Jail because of a speeding ticket, but this was done so that Jackson's codefendant, who also was housed in the Dunklin County Jail, would not know that officers were talking to Jackson about the murder that Jackson and the codefendant committed.

As soon as Jackson arrived at the Pemiscot County Jail, and before he was interrogated, he was told the truth that he was being separated from the accomplice to question him about murder, and Jackson was advised of his rights, which he waived. Thus Jackson was not coerced.

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TRAFFIC STOP LENGTH

State v. Ross

No. 90375, Mo.App., E.D., June 3, 2008

After a routine traffic stop had concluded, the officer engaged the driver in an initially consensual encounter. Then, after asking some questions about drug trafficking, the officer asked Luconios Ross for consent to search his vehicle. Ross agreed, but then said that the officer would also have to obtain the passenger's consent. The officer told Ross to "wait right there."

The passenger did not consent to a search, and he was taken to a patrol vehicle. The officer then called for a canine unit. The dog alerted and several bundles of marijuana were found in the car. The trial court found that Ross had been unlawfully detained and suppressed the evidence.

The state appealed, but the appeals court affirmed the trial court's ruling. The court pointed out that there was no reasonable suspicion or probable cause to warrant any detention beyond the traffic stop; thus, once the officer told Ross he was free to leave, he could no longer detain him.

UPDATE: CASE LAW

The court acknowledged that a consensual encounter can follow a traffic stop, but the court examined the circumstances of the case and concluded that the conversation after the stop was not consensual.

Note: This case also addressed a defendant's standing to contest the search of the vehicle. The facts showed that the vehicle did not belong to Ross, and that it had not been rented by him. Since Ross was contesting his detention (and not solely the search), Ross had standing since the search was a fruit of his illegal detention.

MIRANDA, IN-CUSTODY DETERMINATION, REASONABLE SUSPICION TO STOP, SEARCH INCIDENT TO ARREST

State v. Dickson

No. 90382, Mo.App., E.D., May 6, 2008

Miranda, in-custody determination: Although detention of passenger Joseph Dickson and the driver was lawful, Dickson's statements were obtained in violation of Miranda.

The questioning could not be considered preliminary on-the-scene questioning, because both Dickson and the driver had been asked for identification, the driver had been arrested, and Dickson had been handcuffed during a car search.

Under such circumstances, the court was unwilling to conclude that the trial court had erred in determining that Dickson would not have felt at liberty to terminate the encounter and leave.

Reasonable suspicion to stop: A patrolling officer saw a vehicle leaving a known narcotics area. A check of the car's license plate revealed outstanding warrants for the driver. In reversing the trial court's suppression ruling, the court observed that these were sufficient facts to support a finding of reasonable suspicion to stop the car.

Search incident to arrest: After making a valid investigatory stop of a vehicle based on an outstanding warrant, the officer confirmed there was an outstanding warrant for the driver. Thus, the officer could lawfully arrest the driver and then search the vehicle.